

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of)	
)	
Implementation of Section 621(a)(1) of the Cable)	
Communications Policy Act of 1984 as amended)	MB Docket No. 05-311
by the Cable Television Consumer Protection and)	
Competition Act of 1992)	
)	

**COMMENTS OF THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS,
THE NATIONAL LEAGUE OF CITIES,
THE NATIONAL ASSOCIATION OF COUNTIES,
THE U.S. CONFERENCE OF MAYORS,
THE ALLIANCE FOR COMMUNITY MEDIA,
AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY**

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SUMMARY

While the FCC may have a useful role to play by gathering data about local franchising, Title VI gives the Commission no authority to adopt rules to implement § 621(a)(1) or to adjudicate disputes arising under § 621(a)(1). Rather, the language of § 621(a)(1) and § 635(a) makes plain that Congress gave authority over § 621(a)(1) to the courts, not the FCC. Moreover, even if the FCC had authority to interpret or enforce § 621(a)(1), its jurisdiction would at most be concurrent with that of the courts; thus the Commission's interpretation of § 621(a)(1) would be entitled to no deference by the courts.

The cable franchising process is inherently local and fact-specific, because the Cable Act decrees that cable franchises must ensure that “cable systems are responsive to the needs and interests of the *local* community,” 47 U.S.C. § 521(2). A “one-size-fits-all” approach is antithetical to what Congress envisioned the cable franchising process to be, and Congress' decision was a wise one. But regardless whether the FCC or industry agrees, the Commission is powerless to alter the local, community-specific approach to cable franchising that Congress endorsed in the Cable Act.

LFAs nationwide welcome competition and are eager to issue additional franchises to compete with incumbent cable operators. The evidence supporting this conclusion is rather comprehensive on a nationwide scale (the only scale that should be of any relevance to the FCC here).

The conclusion that LFAs have embraced the policy behind § 621(a)(1) is further supported by the remarkable dearth of reported precedent concerning § 621(a)(1) in general, and its “unreasonable refusal” provision in particular, in the nearly fourteen years since it was

enacted. Thus, the *NPRM*'s proposal to adopt rules implementing § 621(a)(1) is a solution in search of a problem.

LFA franchising decisions are made by elected legislative bodies – city councils, county councils and commissions, and town councils. The Commission can rest assured that LFAs' constituents want cable competition. That is a far more effective, and democratic, check on unreasonable refusals to award competitive franchises than any FCC rules could ever provide.

A principal moving force behind the *NPRM* appears to be complaints to the FCC by AT&T (formerly SBC), Verizon and other RBOCs about the supposed difficulties they claim to have encountered in the local franchising process. While we welcome the RBOCs' belated interest in finally entering the market to compete with incumbent cable operators, the Commission should not be misled by attempts to shift blame to LFAs for delays resulting from the RBOCs' own business decisions.

The 1996 Act repealed the telephone-cable crossownership prohibition and gave the RBOCs (and other ILECs) not one, but *four* different means to enter the multichannel video market. Yet, for eight or more of the nearly ten years since the 1996 Act was passed, the RBOCs, and especially AT&T and Verizon, made no serious effort to enter the multichannel video market as a cable operator, a video common carrier or an open video system operator. AT&T (in its former incarnation as SBC), not only did not pursue entry into the cable market, but took affirmative steps to *exit* that market. Although RBOCs such as Verizon and AT&T were certainly free to make their own business decisions not to enter (or to exit) the cable market despite the invitation Congress gave them in the 1996 Act, they are not free – or at least certainly should not be free – to turn around and blame LFAs and the local franchising process for the

consequences of their own business decisions to delay entry into (and in AT&T's case, to exit) the market.

The short answer to the *NPRM*'s question, "should cable service requirements vary greatly from jurisdiction to jurisdiction?," is "yes." Indeed, not only should such requirements vary, the Cable Act decrees that they *must* vary, for the Act is built on the principle that cable systems must be "responsive to the needs and interests of the *local* community."

The RBOCs' complaint about how long it supposedly takes to obtain a franchise rests on mischaracterizations and willful balking at the locally-oriented nature of cable franchising that the Cable Act requires. AT&T is in no position to complain about the length of the franchising process. It has never bothered to try. Verizon, unlike AT&T, has sought franchises. We have no doubt that Verizon (and any other newcomer) would be able to obtain local franchises almost as quickly as it wants (and certainly faster than Verizon and AT&T have to date been able to provide cable service on a commercial basis in the markets they seek to enter) if the new provider were willing to agree to franchise terms comparable to those imposed on the incumbent cable operator.

Thus, the issue is not whether LFAs are eager to grant competitive franchises; LFAs unquestionably are. The issue is how willing parties like Verizon are to agree to franchise terms that are, as the Cable Act requires, responsive to *local* community cable-related needs and interest. Verizon's complaints about supposed "delay" in the franchising process are thus, in many respects, really a complaint about the local community needs-based model of franchising that is one of the cornerstones of the Cable Act. The FCC should not, and cannot, rewrite the Cable Act to suit industry's preferences.

The § 621(a)(3) prohibition on red-lining and the § 621(a)(4)(A) requirement of a reasonable time to build out a cable system embody the Cable Act's policy of encouraging cable system buildout. And it is a policy that has served the nation well. Cable modem service is the most widely available form of broadband available to Americans today, and local franchise buildout requirements had a hand in that.

While franchise buildout requirements do (and should) vary from community to community based on such factors as geographic size, topography, household density, and neighborhood dispersion, such buildout requirements typically have two critical features that are designed to make buildout as widespread as possible while, at the same time, accommodating economic constraints faced by the cable operator. First, buildout requirements typically have a household density limitation. Second, buildout requirements also invariably provide the operator with a time period to complete building out its system in the franchise area.

When properly understood, buildout requirements should be a problem for the RBOCs only if their business plans are to provide new service only to selected demographic neighborhoods of a community. But if that is indeed the business plan, then local franchise buildout requirements will be essential if the Cable Act's goals are to be protected.

Public, educational and governmental ("PEG") access channel capacity, facilities and equipment requirements, along with institutional network ("I-Net") requirements, are among the most vital elements of the local community cable-related needs and interests that the Cable Act was designed to preserve and protect. Because they are based on each community's own unique local needs, PEG and I-Net requirements vary considerably from community to community. And that is precisely what Congress intended.

Title VI certainly cannot plausibly be construed to grant the FCC authority to become a sort of national franchising authority or national LFA oversight board, either generally or, particularly, in the case of local franchising decisions under § 621(a)(1). Yet that is what adoption of Commission rules or “best practices” with respect to § 621(a)(1) would be.

The *NPRM* (at ¶ 22) questions how what it claims is the “primary justification for a cable franchise” – an LFA’s “need to regulate and receive compensation for the use of public rights-of-way” – “applies” in the case of franchise applicants, such as ILECs, that are already authorized to use those rights-of-way (“ROW”) to provide telephone service. This question reflects a disturbingly flawed and crabbed understanding of the public obligations embodied in local cable franchising that the Cable Act preserves.

To be sure, the fact that a competitive franchise applicant is also the local ILEC will have an effect on the local franchising process. In the case of a local ILEC applicant, for instance, inquiry into the applicant’s financial, technical and legal qualifications can usually be dispensed with. But an applicant’s status as a local ILEC would have little or no affect on other aspects of cable franchising. PEG and I-Net requirements, for example, would be unaffected. The same would be true of franchise fee requirements, customer service standards, buildout requirements and police power requirements.

These are requirements that the Cable Act has decreed are necessary if a cable system is to be truly responsive to *local* community needs and interests. This structure ensures that at least one form of local media is in fact locally-responsive in what has become an era of increasingly consolidated, “cookie-cutter” national media. That, we submit, is a very valuable public benefit that the Cable Act rightly, and as it turns out, presciently preserves.

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The National Association of Telecommunications Officers and Advisors (“NATOA”), the National League Of Cities (“NLC”), the National Association of Counties (“NACO”), the U.S. Conference of Mayors (“USCM”), the Alliance for Community Media (“ACM”), and the Alliance For Communications Democracy (“ACD”), submit these comments in response to the Notice of Proposal Rulemaking, released November 18, 2005, in the above-captioned proceeding (“*NPRM*”).

NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer cable franchising and telecommunications policy for the nation’s local governments.

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The NLC is the oldest and largest national organization representing municipal governments throughout the United States. It serves as a resource to and an advocate for more than 18,000 cities, villages, and towns in furtherance of its mission to strengthen and promote cities.

NACO is the only national organization that represents county governments in the United States. It serves as a national advocate for counties; acts as a liaison with other levels of government; and provides legislative, research, technical and public affairs assistance to its members.

USCM is the official nonpartisan organization of the nation's 1,183 U.S. cities with populations of 30,000 or more. Its mission is to promote effective national urban/suburban policy, strengthen federal-city relationships and ensure that federal policy meets urban needs.

ACM is a nonprofit, national membership organization that represents 3,000 public, educational and governmental cable television access organizations and community media centers across the nation. It pursues its mission of assuring access to electronic media for all through its legislative and regulatory agenda, coalition building, public education, and grassroots organizing.

ACD is an advocacy group for public access television, dedicated to preserving and strengthening community access to media through educational programs and participation in court cases involving franchise enforcement and constitutional questions about community television.

The rules proposed in the *NPRM* would, if adopted, represent an unprecedented and unlawful encroachment by the FCC upon the historically-recognized authority of local franchising authorities over the local cable franchising process, an authority that Congress explicitly intended to preserve in the Cable Communications Policy Act of 1984,¹ and reaffirmed again in the Cable Television Consumer Protection and Competition Act of 1992.² Accordingly, we file these comments to register with the Commission our strong opposition to the *NPRM*.

INTRODUCTION

While the FCC may have a useful role to play by gathering data about local franchising, Title VI gives the Commission no authority to adopt rules to implement § 621(a)(1) or to adjudicate disputes arising under § 621(a)(1). Moreover, even if the FCC had authority to interpret or enforce § 621(a)(1) (which it does not), its jurisdiction would at most be concurrent with the jurisdiction of courts under § 635(a)³ to construe and enforce § 621(a)(1); thus the Commission's interpretation of § 621(a)(1) would be entitled to no deference by the courts.

Given these clear legal limitations, it is difficult to see what purpose the *NPRM* can meaningfully serve, other than as a forum for industry (primarily ILECs, in particular the RBOCs, but to a lesser extent, the incumbent cable industry) to exploit their superior resources and FCC contacts to vilify local franchising authorities ("LFAs") with unsubstantiated, unparticularized, and self-serving "alle[gations]"⁴ and "indications"⁵ of supposed LFA behavior.

¹ Pub. L. No. 98-549, 98 Stat. 2779 (1984), codified as Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 *et. seq.* ("1984 Cable Act" or "1984 Act").

² Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified in amendments to Title VI of the Communications Act of 1934 ("1992 Cable Act" or "1992 Act").

³ 47 U.S.C. § 555(a).

⁴ *NPRM* at ¶ 1.

⁵ *Id.* at ¶ 5.

Any record compiled in this proceeding would inherently be anecdotal and thus misleading,⁶ providing a shaky foundation upon which to rest any reliable conclusions or sound policy. That is especially true since the cable franchising process is, as Congress intended it to be, inherently local and fact-specific, because cable franchises are designed to ensure that “cable systems are responsive to the needs and interests of the *local* community,” 47 U.S.C. § 521(2) (emphasis added).

A “one-size-fits-all” approach is antithetical to what Congress envisioned the cable franchising process to be, and we believe Congress’ decision was a wise one. But regardless whether the FCC or industry disagrees with that, the Commission is powerless to alter the local, community-specific approach to cable franchising that Congress endorsed in the Cable Act.

Subject to these rather substantial caveats, we respond to the *NPRM* below. Part I demonstrates why the FCC lacks the legal authority to adopt rules or enforce § 621(a)(1). Part II responds to the factual questions raised in Part III(A) of the *NPRM*, and Part III deals with Part III(C) of the *NPRM*’s request for comment on proposed rules under § 621(a)(1).

I. THE COMMISSION LACKS LEGAL AUTHORITY TO CONSTRUE OR ENFORCE SECTION 621(a)(1).

The *NPRM* improperly ascribes to the Commission an authority that Congress specifically gave to the courts, not the FCC. Despite plentiful indications of a contrary legislative intent, the *NPRM* tentatively concludes that the FCC has authority to adopt rules

⁶ The *NPRM* (at ¶ 8) characterizes as “anecdotal” evidence “that new entrants have been able to obtain cable franchises,” a characterization that seems peculiar in light of the fact that the undescribed and undocumented “alleg[ations]” and “indications” to the contrary by industry to which the *NPRM* refers (at ¶¶ 1 & 5) can themselves only charitably be described as anecdotal.

concerning, and to enforce, Section 621(a)(1). *NPRM* at ¶¶ 15-18. The *NPRM*'s tentative conclusion is wrong.

**A. Section 635(a) Gives Jurisdiction Over Section 621(a)(1)
To The Courts, Not The FCC.**

The *NPRM*'s tentative conclusion that the Commission has “authority to implement Section 621(a)(1)’s directive that LFAs not unreasonably refuse to award competitive franchises” is based on the view that the FCC is specifically “charged by Congress with the administration of Title VI, which, as courts have held, necessarily includes the authority to interpret and implement Section 621.” *NPRM* at ¶ 15. But the *NPRM* has misread Title VI and, more specifically, §§ 621(a)(1) and 635(a). Although the Commission may have authority to interpret certain provisions of Title VI, it does not have such blanket authority over all of Title VI, and it most certainly does *not* have such authority with respect to § 621(a)(1), because § 635(a) explicitly gives that authority to the courts, *not* the FCC. This conclusion is supported not only by the express language of the statute, but also the overall structure of Title VI and an extensive trail of legislative and regulatory history pertaining to § 621 in particular, and the Cable Act in general.

**1. The *NPRM*'s Claim of Legal Authority To
Implement Section 621(a)(1) Ignores The Plain
Language of Title VI.**

There is no dispute that § 621(a)(1) is a “federal-level limitation” on the local cable franchising process. *NPRM* at ¶ 4. But that is not the issue. The real issue, which the *NPRM* obscures, centers on the question of which forum – the courts or the Commission – has the authority to interpret and enforce § 621(a)(1). Sections 621(a)(1) and 635(a), when read together, point unequivocally to the conclusion that enforcement authority for § 621(a)(1) rests exclusively with the courts.

Because the “first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself[.]” *A.C.L.U. v. F.C.C.*, 823 F.2d 1554, 1568 (D.C. Cir. 1987); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985), we turn first to the text of the statute. In the 1992 Cable Act, Congress simultaneously amended both § 621(a)(1) and § 635(a), the provision governing court review of certain Cable Act provisions. These two provisions were amended as follows:

[Section 621](a)(1) A franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; ***except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635 for failure to comply with this subsection.***

[Section 635](a) Any cable operator adversely affected by any final determination made by a franchising authority under Section ***621(a)(1)***, 625 or 626 may commence an action within 120 days after receiving notice of such determination, which may be brought in –

- (1) the district court of the United States for any judicial district in which the cable system is located; or
- (2) in any State court of general jurisdiction having jurisdiction over the parties.

47 U.S.C. § 541(a)(1) & 47 U.S.C. § 555(a), respectively (emphasis added to indicate 1992 amendments).

Nor was the simultaneous amendment of §§ 621(a)(1) and 635(a) in this way some mere coincidence. To the contrary, the two changes were inextricably linked to one another in the same subsection of the 1992 Act:

SEC. 7. AWARD OF FRANCHISES; PROMOTION OF COMPETITION.
(a) Additional Competitive Franchises.—

(1) AMENDMENT.—Section 621(a)(1) of the Communications Act of 1934 (47 U.S.C. 541 (a)(1)) is amended by inserting before the period at the end of [sic] the following: “; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635 for failure to comply with this subsection”.

(2) CONFORMING AMENDMENT.—Section 635(a) of the Communications Act of 1934 (47 U.S.C. 555(a)) is amended by inserting “621(a)(1),” after “section”.⁷

The *NPRM* seems completely oblivious to the fact that the 1992 Act simultaneously amended § 635(a) to add § 621(a)(1) to the short list of provisions of the Cable Act (the other two being the franchise modification provision of § 625 and the franchise renewal provision of § 626) for which Congress explicitly assigned review to the courts. Congress specifically created a right of action for any aggrieved cable operator “adversely affected” by any “final” decision made by a franchising authority under 621(a)(1). 47 U.S.C. 555. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (“Congress established an enforcement scheme independent of the Executive and provided aggrieved [private parties] with direct recourse to federal court where their rights under the statute are violated”).

Thus, the amendment to § 635(a), giving courts power to review § 621(a)(1) decisions, went hand-in-hand with the § 621(a)(1) amendment that the *NPRM* claims purportedly gives the Commission the power to implement § 621(a)(1). Given the inextricable link between the § 621(a)(1) and § 635(a) amendments, however, these amendments must both be read together in order to reveal their intended meaning. And the only plausible way to read them together is that if an LFA violates the “unreasonable refusal” provision of § 621(a)(1), Congress intended that the remedy lies with the courts, *not* the Commission.

⁷ 1992 Cable Act, § 7, 106 Stat. at 1483.

The Conference Report to the 1992 Act confirms what the plain language already makes clear. It explains that the inclusion of § 621(a)(1) within § 635(a)'s statement of jurisdiction was no mere coincidence but a “conforming amendment.”⁸ In light of this, there can be no question that Congress intended the courts to be the exclusive remedy for “unreasonably refused” cable franchise applicants. The *NPRM*'s reading, by contrast, disregards the plain unambiguous language of these two interrelated amendments in the 1992 Act, effectively rendering the 1992 Act's amendment of § 635(a) mere surplusage. But “[t]here is a presumption against construing a statute as containing superfluous or meaningless words or giving it a construction that would render it ineffective.” *United States v. Blasius*, 397 F.2d 203, 207 n. 9 (2d Cir. 1968).

The *NPRM* (at ¶ 15) is therefore simply wrong in asserting that the language of § 621(a)(1), when coupled with the simultaneous amendment of § 635(a), “indicate[s] that Congress considered the goal of greater cable competition to be sufficiently important to justify the Commission's adoption of rules.” Indeed, the *NPRM* stands the 1992 Act's amendment of § 635(a) on its head, for it would allow the Commission to usurp the authority Congress specifically gave to the courts under § 635(a). The *NPRM*'s construction thus violates the plain meaning of the statutory language. *See, e.g., GTE Service Corp. v. FCC*, 205 F.3d 416, 421 (D.C. Cir. 2000); *City of Dallas v. FCC*, 165 F.3d 341, 347 (5th Cir. 1999). Because the drafters of the 1992 Act explicitly linked the “unreasonable refusal” provision of § 621(a)(1) with their simultaneous amendment of § 635(a) to include § 621(a)(1) jurisdiction, the only reasonable reading of these amendments is that Congress intended that, as is the case with franchise modification and renewal claims under §§ 625 and 626, interpretation and enforcement authority with respect to § 621(a)(1) resides exclusively with the courts, *not* the FCC.

⁸ See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 25-26 (1992) (“1992 Conf. Report”).

It is no response to suggest that § 635(a)'s inclusion of § 621(a)(1) was intended only to give courts concurrent jurisdiction with the FCC over § 621(a)(1). To the contrary, reading § 635(a) as only granting courts concurrent jurisdiction with the FCC would render § 635(a) surplusage. The law is clear that courts already share concurrent jurisdiction with the FCC with respect to a number of other Title VI provisions that are not specifically enumerated in § 635(a). *See, e.g., Time Warner Cable of New York City v. City of New York*, 118 F.3d 917 (2d Cir. 1997) (holding courts have jurisdiction in a PEG programming matter although § 611 is not listed in § 635); *Charter Communications v. County of Santa Cruz*, 304 F.3d 927 (9th Cir. 2002) (construing § 617 regarding franchise transfers even though § 617 not listed in § 635(a)); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993) (court construes § 621(a)(2) even though § 621(a)(2) is not listed in § 635(a)); *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993) (same); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 182 (1993) (same); *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989) (same); *A.C.L.U.*, 823 F.2d at 1573-74 (holding that the courts and the FCC share concurrent jurisdiction in franchise fee matters even though § 622 is not listed in § 635(a)).

The general structure of Title VI and the necessity of imparting an effective meaning to § 635(a) render untenable the proposition that the FCC can claim concurrent jurisdiction with respect to § 621(a)(1). Given that the courts already share concurrent jurisdiction with the FCC on many provisions in Title VI that are not listed in § 635(a), the only way to give § 635(a) any meaning at all is to construe it to give courts exclusive jurisdiction with regard to the three Title VI provisions it enumerates.

The *NPRM* also fails to come to grips with the careful balance that Congress struck when it made the fundamental distinction that LFAs, not the Commission, would be the sole authority on franchising. A cursory review of Title VI's allocation of responsibilities between LFAs and the FCC supports this conclusion. Congress explicitly stated where it contemplated that the FCC had a role to play in Title VI matters. For example, Title VI specifically authorizes the FCC to undertake certain regulatory responsibilities with respect to cable. *See, e.g.*, 1984 Act, § 612(e) (ruling on complaints regarding an operator's refusal or failure to provide leased access); § 613(b) (defining the "rural area" exemption from the telephone company cross-ownership ban); § 613(c) (dictating rules regarding the "ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community"); § 623(b) (adopting rules relating to regulation of cable service rates); § 624(e) (setting "technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise"); and § 634(d),(e), (f) and (g) (delineating rules and taking action to enforce cable operators' equal employment opportunity obligations).⁹ Title VI also reflects Congress' intent to restrict the Commission's and LFAs' authority over cable in certain areas. *See, e.g.*, 1984 Act, § 612(b)(2) (prohibiting the allocation of capacity for leased access in excess of the statutory requirement); § 622(i) (prohibiting the FCC and any other agency from regulating the amount of franchise fees or use of funds derived from such fees); § 623(a) (limiting regulation of cable rates); and § 624(f) (limiting the authority of the FCC and LFAs over requirements regarding the "provision or content of cable services").¹⁰ By giving the FCC a specifically defined and limited role in Title VI matters (in stark contrast to the far broader and general authority given the FCC under Titles I, II and III of the Act), Congress clearly indicated

⁹ 1984 Act, §§ 612(e), 613(b) & (c), 623(b), 624(e) & 634, 98 Stat. at 2784-85, 2788-2790 & 2797-2800.

¹⁰ *Id.* at §§ 612(b)(2), 622(i), 623(a) & 624(f), 98 Stat. at 2783, 2788 & 2790.

that the FCC would *not* play a role in other areas of Title VI, leaving those matters to LFAs and, where disputes arose, to the courts.

When Congress “includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted). Thus, Congress’ explicit grant of jurisdiction over § 621(a)(1) matters to the courts precludes imputing to the FCC jurisdiction over such matters. To construe the disparity otherwise would eviscerate the plain meaning of § 635(a). On the basis of the language of the 1992 amendments, “[i]t is, in short, overwhelmingly clear that, in passing the [Act], Congress acted - as it is presumed to act. . . with full awareness.” *Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *see, e.g., Lorillard v. Pons*, 434 U.S. 575, 581-582 (1978). Contrary to the *NPRM*’s assertions, “we have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals by what [the administrative agency] asserts are less than optimal means. In such a case. . . the agency is [not] free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress.” *Alabama Power v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979). Accordingly, “an [administrative] agency may not issue regulations covering an area in which it has no jurisdiction.” *Kelley v. E.P.A.*, 15 F.3d 1100, 1105 (D.C. Cir. 1994) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990)) (internal quotations omitted).

Moreover, the FCC cannot bootstrap its way around this problem based on § 2(a) of the Communications Act, 47 U.S.C. § 152(a). It is well-settled that the FCC traditionally has based its exercise of “ancillary” jurisdiction on § 2(a) of the Act (“The provisions of this act shall apply to all interstate and foreign communication by wire or radio . . .”). *See United States v.*

Southwestern Cable Co., 392 U.S. 157, 167-69, 171-73 (1968). The 1984 Cable Act, however, limited the reach of § 2(a) with respect to Title VI by adding the following language to § 2(a) of the Communications Act:

The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, ***as provided in Title VI.***¹¹

As this amendment makes clear, Congress deliberately chose to limit the Commission's § 2(a) authority over cable service to only that authority explicitly granted to the FCC in Title VI. In other words, the Commission cannot rely on § 2(a) to go beyond what is plainly provided for in the text of Title VI. In this instance, Sections 621(a)(1) and 635(a) are what is "provided in Title VI," and thus § 635(a) – and its requirement of resort to the courts, not the FCC – is what controls.

B. The Relevant Legislative Histories Indicate That Section 621(a)(1) Jurisdiction Rests With The Courts.

As stated in *A.C.L.U. v. F.C.C.*, "[o]nly where [the statutory] expression is genuinely ambiguous . . . is legislative history useful or necessary." 823 F.2d at 1568 (internal citations omitted); *see also Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("[if] the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" (internal citations omitted); *Maine v. Thiboutot*, 448 U.S. 1, 6 n.4 (1980) ("Where the plain language . . . is as strong as it is here, ordinarily 'it is not *necessary* to look beyond the words of the statute.' ") (citations omitted) (emphasis in original). In an abundance of caution, however, we review the pertinent legislative history of the 1984 Act, which, *inter alia*, states: "*It is the Committee's intent that the franchise*

¹¹ 1984 Act, § 3(a)(1), 98 Stat. at 2801 (emphasis added).

process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs.”¹² We also review the relevant history of the 1992 Act. As a general matter, Congress’ decision in § 635(a) to reserve to courts the exclusive authority to construe and enforce § 621(a)(1) is perfectly consistent with the Act’s overriding goal of favoring *local*, community-based franchising to be responsive to *local* community cable-related needs. 47 U.S.C. § 521(2). Courts are much better suited than the FCC to resolve local franchise-specific, fact-specific disputes.

1. *The 1984 Act.*

The legislative history of the 1984 Act makes clear that Congress reserved authority over the franchising process, almost in its entirety, to LFAs, not to the Commission. *See, e.g., 1984 House Report* at 19 (“Primarily, cable television has been regulated at the local government level through the franchise process. . . . [this legislation] establishes a national policy [t]his policy continues reliance on the local franchising process as the primary means of cable television regulation”) (emphasis added)); *id.* at 25 (“This legislation . . . continu[es] to provide the franchising authority with the ability to assure that renewal proposals are reasonable to meet community needs and interests”); *id.* at 26 (“Each local franchising authority may assess the cable operator a fee for the operator’s use of public ways”); and *id.* at 26 (“H.R. 4103 explicitly grants [the power to require particular cable facilities and to enforce requirements in the franchise to provide those facilities] to the franchising authority”). Where Congress wished to delegate certain powers to the Commission, it expressly announced its intent to do so. *See,*

¹² H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24, reprinted in 1984 U.S.C.C.A.N. 4655 (“1984 House Report”) (emphasis added).

e.g., id. at 25 (“ . . . municipal authority to regulate basic cable rates turns on whether a cable system faces effective competition in its market, as determined by the FCC”).

The specific history of the original, 1984 version of § 621(a)(1) and other sections of the 1984 Act further affirms the primacy of LFAs in this area. *See id.* at 59 (“This provision grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area”). Delegation of authority to the Commission is notable in its absence. *See id.* at 72 (“ . . . the procedures and standards established by this section are available for the cable operator or the franchising authority to initiate if necessary”). Equally notable in its absence from the 1984 Cable Act legislative history is any mention of the FCC remaining in its pre-1984 business of regulating cable. Clearly, Congress was not contemplating FCC oversight or control of the regulatory scheme for granting franchises under § 621(a)(1). “In fact . . . the totality of the legislative history of the Act demonstrates with unusual clarity [what] was intended.” *Rodriguez v. United States*, 480 U.S. at 525.

2. *The 1992 Act.*

Notwithstanding the clear and inextricable relationship between the 1992 amendments to § 621(a)(1) and § 635(a), the *NPRM* attempts to construe the 1992 amendments as an indication that “Congress considered the goal of greater cable competition to be sufficiently important *to justify the Commission’s adoption of rules.*” ¶ 15 (emphasis added). While it is true that the 1992 amendments exhibit Congress’ intent to place limitations on LFAs’ ability to refuse to grant additional competitive franchises, nothing in these amendments suggests that Congress contemplated that the FCC, rather than the courts, would have authority to implement or interpret that limitation; to the contrary, as we have seen, § 635(a) provides that courts, not the FCC, have

that authority. A review of the 1992 Cable Act’s legislative history makes plain that the *NPRM*’s reading overreaches:

Based on the evidence in the record taken as a whole, it is clear that there are benefits from competition between two cable systems. Thus, the Committee believes that local franchising authorities should be *encouraged* to award second franchises. Accordingly, [the 1992 Cable Act,] as reported, prohibits local franchising authorities from unreasonably refusing to grant second franchises.¹³

Section 621(a)(1), as revised, indicates a statutory prohibition against unreasonable refusals in the granting of franchises and merely encourages LFAs to award second franchises.

A searching review of the 1992 Act legislative history further reveals the contours of the intended congressional scheme for § 621(a)(1). As one federal district court noted:

The House version contained a specific list of “reasonable” grounds for denial. H. R. Conf. Rep. No. 102-862, at 168-69 (1992). The Senate version, on the other hand, listed “technically infeasible” and left other reasonable grounds undefined. By choosing not to adopt a federally mandated list of reasonable grounds for denial in favor of an open-ended definition, *Congress intended to leave states with the power to determine the bases for granting or denying franchises, with the only caveat being that a denial must be “reasonable.”*

Knology, Inc. v. Insight Communications Co., L.P., 2001 WL 1750839 at * 2 (W.D. Ky. March 20, 2001) (citation omitted) (emphasis added).

As a fundamental policy matter, Congress in Title VI intended that cable operators be responsive to *local* community needs and interests, which is why the regulatory scheme charted by Title VI expresses a clear preference for local franchising, and for court (rather than FCC) review of franchising matters. Since facts and circumstances vary across communities, it made perfect sense for Congress to have given oversight authority for franchising disputes to the courts

¹³ S. Rep. No. 92, 102d Cong., 1st Sess. at 47 (1991) *reprinted in* 1992 U.S.C.C.A.N. 1133 (“1992 Senate Report”) (emphasis added).

rather than the FCC. Courts, unlike the FCC, are better suited to assess unique and differing factual situations that will inherently arise in § 621(a)(1) disputes. Put a little differently, the franchising process governed by § 621(a)(1) is peculiarly unsuited to the generalized “one-size-fits-all” prescriptions that FCC rules are designed to fill.

C. Contrary To The *NPRM*’s Suggestion, *City Of Chicago* Lends No Support To The Claim That FCC Has Section 621(a)(1) Jurisdiction.

The *NPRM* (at ¶ 15) cites *City of Chicago v. FCC*, 199 F.3d 424 (7th Cir. 1999), for the proposition that Congress’ delegation to the Commission of authority to administer Title VI “necessarily includes the authority to interpret and implement Section 621.” The *NPRM*, however, overlooks two critical distinctions that render *Chicago* inapposite.

First, *Chicago* is more appropriately characterized not as a § 621 case, but as a case construing the definitions set forth in § 602 of the Act. As a substantive matter, *Chicago* involved an appeal from a declaratory ruling in which the FCC held that an SMATV operator was not a “cable operator” of a “cable system” within the meaning of §§ 602(5) and 602(7), respectively, of the Communications Act. In other words, the case centered on dueling interpretations of these § 602 definitions and, on appeal, the court upheld the FCC’s construction of those § 602 terms. *See City of Chicago*, 199 F.3d at 431-34 (upholding FCC determination that SMATV operator is not a “cable operator” of a “cable system” under §§ 602(5) and (7) and is thus exempt from franchise requirements). The only § 621 issue even arguably before the court in *Chicago* was one that no party to the case disputed: If the SMATV arrangement at issue involved a “cable operator” and a “cable system,” a franchise was required under § 621(b)(1); if the arrangement did not encompass these definitions, it was undisputed that the § 621(b)(1) franchise requirement did not apply.

Second, and perhaps more importantly, *Chicago* was at most a § 621(b)(1) case, not a § 621(a)(1) case. *Chicago* involved a SMATV operator seeking an exemption from the franchise requirements of § 621(b)(1), which prohibits a “cable operator” from providing cable service without a franchise. The court merely noted that it was “not convinced that . . . the FCC has well-accepted authority under the Act but lacks authority to interpret [§ 621(b)(1)] and to determine what systems are exempt from franchising requirements.” *City of Chicago*, 199 F.3d at 428. Since § 635(a) explicitly gives courts exclusive jurisdiction over § 621(a)(1) disputes but not § 621(b)(1) disputes, *Chicago* says nothing at all about the FCC’s jurisdiction over § 621(a)(1). The case had nothing to do with § 621(a)(1)’s prohibition on unreasonable refusals to award additional competitive cable franchises.

D. The *NPRM* Erroneously Invokes Non-Title VI Sources Of Authority To Assert Section 621(a)(1) Jurisdiction.

It is difficult to ignore more than twenty years of regulatory history. *See A.C.L.U.*, 823 F.2d at 1567 n. 32 (“when an agency’s assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue”). The *NPRM* relies on what it characterizes as the broad purposes of § 621(a)(1) and the FCC’s general authority under the Communications Act to claim that promoting greater cable competition justifies the FCC’s adoption of rules to implement § 621(a)(1), as opposed to the court relief that Congress specifically provided in § 635(a). But “[n]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. at 525-26.

Although § 621(a)(1), and Title VI generally, reflect a legislative goal to promote greater cable competition, that alone does not mean that Congress intended the FCC, rather than the courts, to enforce that objective. In the case of § 621(a)(1), Congress made clear that it assigned the role of furthering § 621(a)(1)'s objective to the courts, not the FCC.

1. Section 1 and Section 4(i) Authority.

The *NPRM* tentatively concludes that the Commission's broad authority under §§ 1 and 4(i) of the Communication Act empowers the FCC to adopt rules to implement § 621(a)(1). ¶15. The FCC's general rulemaking authority under these provisions does not, however, provide it with authority beyond what the specific provisions of the balance of the Communications Act allow it to do.

As discussed above, not only are there no Title VI provisions that grant the FCC authority to construe or enforce § 621(a)(1); §§ 621(a)(1) and 635(a) specifically grant that authority to the courts, not the FCC. *See Motion Picture Ass'n of America, Inc., v. FCC*, 309 F.3d 796, 802-03 (D.C. Cir. 2002) (rejecting FCC's "very frail argument" that Sections 1 and 4(i) authorize the agency to adopt rules requiring video description; vacating agency rule adopted under general rulemaking authority). In this proceeding, as in *Motion Picture Ass'n of America*, "the FCC must find its authority in provisions other than [Section] 1." *Id.* at 804. Plainly stated, the FCC's general rulemaking powers do not empower it to do what specific provisions of Act cannot be read to permit:

The FCC's position seems to be that the adoption of rules [implementing § 621(a)(1)] is permissible because Congress did not expressly foreclose the possibility. This is an entirely untenable position. *See Ry. Labor Executives [Ass'n v. Nat'l Mediation Bd.]*, 29 F.3d 655, 671 (D.C.Cir.1994) (en banc) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the

Constitution as well.") (emphasis in original). *See also Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C.Cir.1995) ("We refuse . . . to presume a delegation of power merely because Congress has not expressly withheld such power.") Congress enacted [§ 621(a)(1) and § 635(a)] together. . . . [Congressional] silence surely cannot be read as ambiguity resulting in delegated authority to the FCC to promulgate the disputed regulations.

Motion Picture Ass'n of America, 309 F.3d at 805-06 (emphasis in original) (substituting references to §§ § 621(a)(1) and 635(a) for §§ 713 (a), (b) and 713 (f)).

The *NPRM* does not furnish any reasonable explanation as to why resort to the FCC's general rulemaking authority would on this occasion enable it to construe and enforce § 621(a)(1). To the contrary, because the texts of §§ 621(a)(1) and 635(a), when read together, unambiguously indicate Congress' strong preference for court, rather than FCC, enforcement of § 621(a)(1), the FCC's proposed action in this proceeding is even less justified than its overruled action in *Motion Picture Ass'n of America*.

2. Section 706 Authority.

The *NPRM* also asks (at ¶ 18) whether § 706 of the 1996 Act could empower the Commission to "take action" on concerns related to the franchise process. However, this is another impermissible attempt to bootstrap non-Title VI objectives into Title VI. As discussed above, Title VI clearly states its objectives and, absent a Congressional delegation of power over § 621(a)(1) (and there is none), the FCC is not authorized to adopt rules to implement § 621(a)(1). Moreover, as § 706(g) itself provides, nothing in § 706 "shall be construed to authorize the President to make any amendment to the rules and regulations of the Commission which the Commission would not be authorized by law to make[.]" In other words, the text of this non-Title VI section concedes that it cannot serve to empower the FCC to do what specific

provisions of the Communications Act cannot be read to permit. And since § 635(a) specifically prohibits the *NPRM*'s proposed reading, § 706 cannot save it.

For these reasons, the FCC does not have the legal authority to construe or enforce § 621(a)(1).

II. EVEN IF THE FCC HAD JURISDICTION, *CHEVRON* DEFERENCE WOULD NOT APPLY TO ITS CONSTRUCTION OF SECTION 621(a)(1).

Even if the Commission did have the statutory authority to adopt regulations to implement § 621(a)(1) (which it does not), § 635(a) makes plain that FCC jurisdiction would at best be only concurrent with the jurisdiction of the courts. *See, e.g., Kelley v. E.P.A.*, 15 F.3d at 1105; *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991). Where both the courts and the FCC share concurrent jurisdiction, the FCC's interpretations of the statute would therefore not be subject to the deferential standard of review articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). "[E]ven if an agency enjoys authority to determine . . . a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action." *Kelley v. E.P.A.*, 15 F.3d at 1108.

Therefore, in light of Section 635(a), if the Commission were to adopt rules to implement Section 621(a)(1), its construction of those rules would be entitled to no deference by the courts. The private right of action guaranteed by Section 635(a) is evidence that Congress "intended that [a petitioner's] claim in such an event . . . be evaluated by the federal courts independent of [an agency's] institutional view." *Kelley v. E.P.A.*, 15 F.3d at 1109. Moreover, even if § 635(a)'s language creating the private right of action were ambiguous (and it is not), deference is still not required "because Congress has expressly established the Judiciary and not the [administrative

agency] as the adjudicator of private rights of action arising under the statute.” *Adams Fruit Co.*, 494 U.S. at 649; *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) (rejecting *Chevron* deference because statute was administered by the courts, not by agency). Thus, any rule adopted by the FCC in this proceeding would at best be viewed only as a policy statement “to guide [the Commission’s] enforcement proceedings across the country”; it would not be binding on the courts or entitled to *Chevron* deference by the courts. *Kelley v. E.P.A.*, 15 F.3d at 1109.

The Commission, in light of the plain language of the statute, its legislative history, and the Commission’s own historical interpretation, should reject the invitation in its *NPRM* to substitute its own policy judgments for those of Congress.

III. THERE IS NO CREDIBLE EVIDENCE THAT LFAs HAVE UNREASONABLY REFUSED TO GRANT COMPETITIVE FRANCHISES.

While, as noted above, we do not believe that the FCC has jurisdiction to adopt rules implementing or enforcing § 621(a)(1), we will nevertheless respond to some of the questions raised in Part III(A) of the *NPRM* to provide the Commission with information demonstrating what we believe to be clear: There is no evidence that § 621(a)(1) is not already serving its intended purposes, and thus the *NPRM* is a solution in search of a problem.

We focus here only on information that is more national in scope and that is available to us. By its nature, much of the information sought in Part III(A) is very fact-specific to each LFA. We anticipate that much of that LFA-specific information will be provided in comments filed by individual LFAs.

We caution the Commission, however, that any evidence adduced in this proceeding on the questions asked in Part III(A) of the *NPRM* will inherently be anecdotal, and especially in the

case of information provided by industry, one-sided, often anonymous, and untested by the fire of cross-examination and rebuttal.¹⁴ LFAs do not have the resources of industry to participate in this proceeding in the way that industry will (both in comments and in *ex parte* visits to the Commission), and thus the record will almost certainly be not only anecdotal, but skewed. As a result, the record in this proceeding is unlikely to provide a reliable basis for the Commission to make sound and accurate policy judgments.

Subject to these rather substantial caveats, we respond as follows:

A. The Dearth of Precedent in the Fourteen Years Since Section 621(a)(1) Was Amended Strongly Indicates That There Is No Significant Problem Justifying FCC Action.

LFAs nationwide welcome competition and are eager to issue additional franchises to compete with incumbent cable operators. Given the inherently local nature of the franchising process, the evidence supporting this conclusion, far from being “anecdotal” (*NPRM* at ¶ 18), is rather comprehensive on a nationwide scale (the only scale that should be of any relevance to the FCC here).

The *NPRM* itself, for instance, recognizes the large number of competitive franchises that have been secured by Ameritech (a subsequent AT&T/SBC acquiree), SNET, BellSouth, Qwest, RCN, Verizon and NTCA members in the past decade or so. *Id.* at ¶ 8 & nn. 44-51. And that does not even include the many competitive franchises that LFAs have granted to others, such as

¹⁴ In this regard, we note the FCC’s ruling in *Ex Parte Presentations in Commission Proceedings*, GC Dkt. No. 95-21, Mem. Opin. & Order, 14 FCC Rcd. 18831 (1999), requiring that any local government named in the comments of a party must be served with a copy of those comments to provide the local government with an opportunity to oppose. It is particularly imperative that the Commission require commenters to adhere strictly to this requirement in this proceeding.

non-ILEC-affiliated providers like Grande and Wide Open West, as well as smaller, rural ILECs.¹⁵

The conclusion that LFAs have embraced the policy behind § 621(a)(1) is further supported by the remarkable dearth of reported precedent concerning § 621(a)(1) in general, and its “unreasonable refusal” provision in particular, in the nearly fourteen years since it was enacted. In fact, in that period, there have only been five reported cases that even involved claims that an LFA violated § 621(a)(1)’s “unreasonable refusal” provision, in only two of those cases was a violation found, and in neither did the LFA even deny the franchise application.¹⁶ This leads to the inescapable conclusion that, aside from its legal jurisdiction defects, the *NPRM*’s proposal to adopt rules implementing § 621(a)(1) is a solution in search of a problem.

The *NPRM* also overlooks another crucial reason why LFAs will not unreasonably refuse to grant additional, competitive franchises. LFA franchising decisions are made by elected legislative bodies – city councils, county councils and commissions, and town councils. As such, LFAs are accountable, and must be responsive, to the desires of their electorates. And the Commission can rest assured that LFAs’ constituents want competition in cable service. That is

¹⁵ See, e.g., Comments of the National Cable and Telecommunications Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (filed Aug. 2, 2001); Debbie Narrod, *OVERBUILDERS: The New Generation*, CableFAX’s CableWORLD, Nov. 27, 2000, available at http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=112700&file=overbuilders_new_generation.inc; K.C. Neel, *Deadend at the Headend?*, CableFAX’s CableWORLD, Mar. 18, 2002, available at http://www.cableworld.com/cgi/cw/show_mag.cgi?pub=cw&mon=031802&file=deadend_headend.inc.

¹⁶ See *NEPSK, Inc. v. Town of Houlton*, 167 F.Supp. 2d 98 (D. Maine 2001), *aff’d*, 283 F.3d 1 (1st Cir. 2002) (holding that incumbent cable operator’s response to a request for proposals is not an application for a second, competitive franchise); *Qwest Broadband Services v. City of Boulder*, 151 F.Supp. 2d 1236 (D. Colo. 2001) (holding city charter requiring voter approval of franchises violates § 621(a)(1)); *Knology, Inc. v. Insight Communications Co., L.P.*, 2001 WL 1750839 (W.D. Ky. March 20, 2001) (in a dispute between an incumbent and newly awarded franchise, the LFA’s enactment of a local parity provision that permitted an incumbent to automatically stay the grant of additional franchises was an “unreasonabl[e] den[ial]” in violation of § 621(a)); *Classic Communications, Inc. v. Rural Telephone Service Co., Inc.*, 956 F.Supp. 896 (D. Kan. 1996) (cable operator alleges that LFA unreasonably refused to grant it a competitive franchise; court denies LFA’s motion to dismiss without resolving on the merits whether refusal was unreasonable under § 621(a)(1)); *Liberty Cable v. City of New York*, 893 F.Supp. 191 (S.D.N.Y. 1995) (finding § 621(a)(1) claim not ripe because city had not acted on application yet), *aff’d*, 60 F.3d 961 (2d Cir. 1995).

a far more effective, and democratic, check on any unreasonable refusal to award competitive franchises than any FCC rules could ever provide.¹⁷ And it is a check that is far more consistent with our nation's principles of democracy and federalism than a set of "one-size-fits-all" national rules promulgated by an unelected federal regulatory agency.

B. The Telecommunications Act Of 1996 Gave ILECs – and More Particularly, The RBOCs – Four Different Ways To Enter The Multichannel Video Market, Yet For Most Of The Past Ten Years, The RBOCs Have Done Little, If Anything, To Exploit That Opportunity.

A principal moving force behind the *NPRM* appears to be complaints made to the FCC by AT&T (formerly SBC), Verizon and other RBOCs about the supposed difficulties they claim to have encountered in the local franchising process in the course of their recently-announced plans to upgrade their telecommunications networks to provide (among other things) cable service in competition with incumbent cable operators.¹⁸ While we welcome the RBOCs' somewhat belated interest in finally entering the cable market to compete with incumbent cable operators, the Commission should not be misled by their attempts to shift blame to LFAs for delays resulting from their own business decisions. Nor should LFAs or their residents be forced to bear the burden of sacrificing the local cable-related needs and interests protected by the local franchising process and the Cable Act in an effort to try to mitigate any potentially adverse consequences to the RBOCs resulting from their own business decisions.

A little history will prove the point. Prior to the 1996 Act, the RBOCs (and most other non-rural ILECs) were prohibited from entering the cable market by the telephone-cable

¹⁷ Cf. *Charter Communications v. County of Santa Cruz*, 304 F.3d at 935 (9th Cir. 2002) ("methods exist to promote self-correction [of the local cable franchising process]: citizens can vote out their local representatives").

¹⁸ See, e.g., *NPRM* at ¶¶ 5-6 & nn. 28-37. We note in passing that Consumers for Cable Choice, whose comments in MB Dkt No. 05-255 are cited in note 28 of the *NPRM*, is reportedly an organization largely backed by the RBOCs. See Linda Haugsted, *Telcos Feed 'Grassroots' Group*, 26 Multichannel News 18 (2005); David Lazarus, *Cable 'coalitions' sketchy*, San Francisco Chronicle, Nov. 2, 2005, at C-1; *RBOCs Attempt to Dupe Consumers with Faux 'Coalition'*, Digital Straight Talk, posted Nov. 22, 2005, available at http://www.digitalstraighttalk.com/2005/11/rbocs_dupe_consumers_with_faux.shtml

crossownership prohibition formerly set forth in § 613(b) of the 1984 Act.¹⁹ The 1996 Act repealed that crossownership prohibition and gave the RBOCs (and other ILECs) not one, but *four* different means to enter the multichannel video market.²⁰ The legislative history makes plain that Congress' expectation, and the professed intent of the RBOCs, was that this amendment would result in the RBOCs swiftly entering the multichannel video market and competing with incumbent cable operators.²¹

Yet, for eight or more of the nearly ten years since the 1996 Act was passed, the RBOCs, and especially AT&T and Verizon, made no serious effort to enter the multichannel video market as a cable operator, a video common carrier or an open video system operator.²² And at least one RBOC, AT&T (in its former incarnation as SBC), not only did not pursue entry into the cable market, but in 2001, shortly after it acquired Ameritech, took affirmative steps to *exit* that market by selling off the local cable business in "75 communities" serving "more than 200,000 customers"²³ held by Ameritech.²⁴ This has been AT&T's consistent pattern: AT&T likewise

¹⁹ 1984 Act, 98 Stat. at 2785 (codified at 47 U.S.C. § 533(b) (1984)).

²⁰ 47 U.S.C. § 651(a)(1)-(4) (common carriers may enter the video market as broadcast or wireless providers under Title III, as video common carriers under Title II, as cable operators under Title VI, or as an open video system provider under § 653).

²¹ H.R. Confer. Report No. 458, 104th Cong., 2d Sess. at 171-72, *reprinted in* 1996 U.S.C.C.A.N. 124 ("New section 651 of the Communications Act specifically addresses the regulatory treatment of video programming services provided by telephone companies. Recognizing that there can be different strategies, services and technologies for entering video markets, the conferees agree to multiply entry options to promote competition, to encourage investment in new technologies and to maximize consumer choice of services that best meet their information and entertainment needs").

²² Their only discernible effort on this front was to begin to resell DBS service in some markets, and even that effort did not begin until around 2002 or 2003. Mike Farrell, *DirecTV, BellSouth Hook Up*, 24 Multichannel News 1 (2003); James E. Carroll, *Video: The Next Front in the Broadband War*, Converge! Network Digest, Sept. 9, 2003, available at, <http://www.convergedigest.com/blueprints/ttp03/z1dynamics1.asp?ID=13&ctgy=>; Vince Vittore, *BellSouth Samples Satellite with DirecTV Resale Setup*, Sept. 8, 2003, available at http://telephonyonline.com/ar/telecom_bellsouth_samples_satellite/.

²³ See *NPRM* at ¶ 8 & n. 45.

²⁴ Ted Hearn, *McCain, Powell Clash Over Rates*, Multichannel News, Jan. 20, 2003 at 3; SBC Communications, Inc., Form 10-K, at 8, Exh. 13 at 5, and Note 3 (Dec. 31, 2001).

jettisoned the video operations that it had previously acquired in its acquisition of Pacific Telesis, and had to be ordered by the Connecticut Department of Public Utilities not to abandon SNET's cable franchise for two years.²⁵

Although RBOCs such as Verizon and AT&T were certainly free to make their own business decisions not to enter (or to exit) the cable market despite the invitation Congress gave them in the 1996 Act, they are not free – or at least certainly should not be free – to turn around and blame LFAs and the local franchising process for the consequences of their own business decisions to delay entry into (and in AT&T's case, to exit) the market. Yet that is precisely what they seek to do.²⁶ The Commission should not be deceived by the RBOCs' efforts to transform their own business decisions to sit on the sidelines of the cable market for nearly a decade into an excuse to reward those decisions with relief from the local franchising process that had nothing to do with those business decisions. Had the RBOCs done what they promised Congress they would do in securing repeal of the telephone-cable crossownership ban back in 1996, they would not be facing the supposed “catch-up” problem they face now.

C. A Franchise Is A Contract That The Cable Act Requires To Be Responsive To Local Cable-Related Community Needs And Interests, Not A Form Nationwide Contract, Which Is What The RBOCs Appear To Demand.

The *NPRM* (at ¶ 5) recounts industry allegations that the local franchising process “takes too long” and “involves outrageous demands by some LFAs” supposedly unrelated “to video

²⁵ *Fifth Annual Report In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC 98-335 at ¶ 115 (rel. Dec. 23, 1998); White Paper, *The Consumer Case Against the SBC-Ameritech Merger*, Consumers Union, Jan. 20, 1999 at § V, available at <http://www.consumersunion.org/other/newsbc-amersw199.htm>; Alan Breznick, *Ameritech Keeps Plugging into Video*, CableFAX's Cable WORLD, June 7, 1999, available at http://broadband-pbimedia.com/cgi/cw/show_mag.cgi?pub=cw&mon=060799&file=ameritech_keeps_plugging.inc.

²⁶ See, e.g., Comments of Consumer for Cable Choice, BellSouth and Verizon in MB Dkt No. 05-255, cited in *NPRM* at nn. 28-33.

services or to the rationales for requiring franchises,” and then (at ¶¶ 12-13) asks several questions directed at these allegations, as well as whether the cable franchising process should vary from locality to locality²⁷

The short answer to the *NPRM*’s question, “should cable service requirements vary greatly from jurisdiction to jurisdiction?,” is “yes.” Indeed, not only should such requirements vary, the Cable Act decrees that they *must* vary, for the Act is built on the principle that cable systems must be “responsive to the needs and interests of the *local* community.”²⁸

The *NPRM*’s question (at ¶ 13) whether LFAs are “demanding concessions that are not relevant to providing cable services,” and Verizon’s allegations of the same (*id.* at ¶ 5 & n. 33) rest on an apparent misreading of the Cable Act. As an initial matter, Verizon’s allegations about requirements unrelated to “video services” simply ignores that (1) the “cable service” definition is *not* limited to “video programming” or to the undefined concept of “video services,” 47 U.S.C. § 522(6); and (2) the Cable Act makes equally clear that among the types of requirements that are “cable-related,” and that LFAs are entitled by the Act to require, include in-kind institutional networks, 47 U.S.C. §§ 531(b), 541(b)(3)(D), & 544(b)(1) & (2)(A), something that we understand that Verizon has steadfastly refused to agree to provide in its negotiations with LFAs.

²⁷ The *NPRM* also rather inexplicably asks what problems incumbent cable operators are encountering with the cable franchising, and whether current local franchising “procedures or requirements” are appropriate for incumbent cable operators. What this question possibly has to do with the issue at hand – § 621(a)(1) – the *NPRM* does not say. By its terms, § 621(a)(1) prohibits LFAs from “unreasonably refus[ing] to award an *additional competitive franchise*.” (Emphasis added.) It is therefore inapplicable to incumbent cable operators that have already been awarded a franchise. See *NEPSK, Inc. v. Town of Houlton*, 167 F.Supp. at 102 (§ 621(a)(1) inapplicable to incumbent cable operator); *I-Star Communications v. City of East Cleveland*, 885 F.Supp. 1035, 1042 (N.D. Ohio 1995) (§ 621(a)(1) inapplicable to incumbent franchisee’s complaint about possible franchise revocation). In the case of most incumbent cable operators, their future franchise terms are governed by the Cable Act’s renewal provision, 47 U.S.C. § 546, but they are not in any way governed by the “unreasonable refusal” provision of § 621(a)(1).

²⁸ 47 U.S.C. § 521(2) (emphasis added). See also 47 U.S.C. § 546 (calls for ascertainment of “future cable-related community needs and interests” and an operator’s renewal proposal is judged on, *inter alia*, its responsiveness to those needs and interests).

More generally, in asking whether LFAs are “demanding concessions” unrelated to cable service, the *NPRM* seems oblivious to the Cable Act, which makes clear – and has made clear since its original enactment in 1984 – that LFAs may not impose non-cable-related requirements in franchises.²⁹ In other words, Verizon is either (a) too narrowly construing the concept of “cable-related” needs, or (b) attempting to mislead the Commission based on franchising activities that occurred before the 1984 Cable Act was enacted and are no longer an issue. Either way, Verizon is simply wrong.

The RBOCs’ complaint about how long it supposedly takes to obtain a franchise rests on mischaracterizations and willful balking at the locally-oriented nature of cable franchising that the Cable Act requires. AT&T (formerly SBC) certainly has no grounds to complain. As the Commission knows, it has taken the position that the multichannel video service component of its Project Lightspeed is not a “cable service,” that it therefore is not subject to the franchise requirement of the § 621(a)(1), and thus needs no franchise at all.³⁰ As a result, AT&T has not deigned to see fit to even apply for a local cable franchise. Having arrogantly viewed itself as above the need for a local franchise, AT&T is in no position to complain about the length of the franchising process. It has never bothered to try.

Verizon, unlike AT&T, has sought franchises, albeit in only a fairly limited number of markets.³¹ But in assessing allegations about delays in the franchising process, the Commission must keep two things in mind.

²⁹ *E.g.*, 47 U.S.C. §§ 541(b)(3), 544(a), 544(b) & 546(c)(1)(D). *See also* 1984 House Report at 68-69.

³⁰ *See* SBC Ex Parte Filing, *IP-Enabled Services*, WC Docket No. 04-36 (filed Sept. 14, 2005). We vehemently disagree with AT&T’s view.

³¹ *See, e.g.*, *Telco Video Franchises, Muni Networks Share Spotlight at NATOA Conference*, 71 Telecommunications Reports at 15 (Oct. 1, 2005); Dina ElBoghdady, *Verizon Pursues Local Cable Franchises*, Washington Post, July 19, 2005 at D-4; David P. Willis, *Taking on Cable*, Asbury Park Press, Oct. 2, 2005, available at <http://www.app.com/apps/pbcs.dll/article?AID=/20051002/BUSINESS/510020365/1003/POLITICS>.

First, a cable franchise is not a unilaterally-imposed instrument but a negotiated contract between the LFA and the cable operator.³² As a result, any complaints by one party in bilateral negotiations about delays must be taken with a grain of salt, since any delay can just as easily be the fault of recalcitrance in that party's negotiating position as it is the recalcitrance of the other. Put a little differently, we have no doubt whatsoever that Verizon (and any other newcomer) would be able to obtain local franchises almost as quickly as it wants (and certainly faster than Verizon and AT&T have to date been able to provide cable service on a commercial basis in the markets they seek to enter) if the new provider were willing to agree to franchise terms comparable to those imposed on the incumbent cable operator.³³

Thus, the issue is not whether LFAs are eager to grant a competitive franchise to new providers like the RBOCs; LFAs unquestionably are. The issue is how willing parties like Verizon are to agree to franchise terms that are, as the Cable Act requires, responsive to *local* community cable-related needs and interest.

Which brings us to the second point. The touchstone for a particular LFA's current local cable-related needs and interests is its franchise with the incumbent cable operator.³⁴ In most cases (unless the incumbent is itself in franchise renewal proceedings with the LFA), that will

³² See, e.g., 1 C. Ferris & F. Lloyd, *Telecommunications Regulation* ¶ 13.14 [1] (through Release No. 46, Dec. 2005).

³³ By "comparable," we do not mean identical. There are certainly areas where a competitive franchise might differ from the incumbent operator's franchise. Depending on whether the new entrant is a small "overbuilder" or an ILEC, for instance, there may be reasons to impose different buildout requirements on the newcomer. There also may — again, depending on local facts and circumstances — be reasons to monetize PEG and I-Net obligations and transform them into a per-subscriber or gross revenue percentage arrangements. But with respect to some aspects of a franchise, there would seem to be no rational basis for distinguishing between the incumbent and the newcomer. Examples here would include the number of PEG channels, the franchise fee revenue base and percentage amount, and enforcement provisions.

³⁴ Again, this does not necessarily mean the newcomer's franchise must be the same as the incumbent's, see note 33, *supra*, but the incumbent's franchise certainly is the logical starting point for determining local cable-related community needs and interests.

mean that an LFA will look to the current incumbent's franchise as a measuring stick for the new entrant's franchise.

Verizon, on the other hand, appears to have a different starting point for negotiations. It instead wishes that each LFA would adopt Verizon's own "form" local franchise with as few modifications as possible, so that Verizon's franchises across the country can be as uniform as possible. While Verizon's preference is certainly understandable from its business point of view, what is *not* reasonable is for it to complain about delays in negotiating franchises while, at the same time, it insists in negotiations with LFAs that its franchise must be based on Verizon's national model rather than one that is based on the LFA's own particular local cable-related needs and interests, as the Cable Act requires. Verizon's complaints about supposed "delay" in the franchising process are thus, in many respects, really a complaint about the local community needs-based model of franchising that is one of the cornerstones of the Cable Act. 47 U.S.C. § 521(2). The FCC should not, and cannot, rewrite the Cable Act to suit industry's preferences.

IV. THE *NPRM*'S PROPOSED RULES ARE BEYOND THE FCC'S AUTHORITY TO ADOPT AND WOULD BE ARBITRARY AND CAPRICIOUS.

In Part III(C) of the *NPRM*, the Commission solicits comments on possible rules it might adopt concerning § 621(a)(1). As noted above in Part I, we do not believe that the FCC has jurisdiction to adopt rules implementing or construing § 621(a)(1) or to enforce § 621(a)(1), and that even if it did, any FCC interpretation of § 621(a)(1) would be entitled to no deference by the courts. The balance of our comments in this section is subject to that caveat.

A. Section 621(a)(1) Prohibits Only The Denial of A Competitive Franchise.

While admitting that § 621(a)(1) prohibits only the "unreasonable refus[al] to *award* an additional competitive franchise" (emphasis added), the *NPRM* nevertheless tentatively

concludes that the FCC is empowered to rewrite that language and expand the scope of § 621(a)(1) to reach the “establishment of procedures and other requirements that have the effect of unreasonably interfering with the ability of a would-be competitor to obtain a competitive franchise, either by (1) creating unreasonable delays in the process, or (2) imposing unreasonable regulatory roadblocks” *NPRM* at ¶ 19.

But that is *not* what § 621(a)(1) says. As courts have recognized, § 621(a)(1) requires that a franchise application must be *denied*.³⁵ Any doubt on this point is removed by the last sentence of § 621(a)(1):

Any applicant whose application for a second franchise *has been denied by a final decision of the franchising authority may appeal such final decision* pursuant to the provisions of Section 635 for failure to comply with this subsection.

47 U.S.C. § 541(a)(1) (emphasis added).

Section 621(a)(1) simply cannot be construed to allow an applicant that is displeased with the progress of its application to bypass the last sentence of that provision and file a complaint in court or at the FCC challenging a *non-final* decision of an LFA. Such an interpretation would simply, and impermissibly, rewrite § 621(a)(1) to suit the FCC’s policy preferences. Congress “does not . . . hide elephants in mouseholes.” *Gonzales v. Oregon*, 126 S.Ct. 904, 921 (2006). It is ludicrous to suggest that Congress, having provided that only “final” decisions of the “denial” of a franchise application may be appealed, somehow intended, *sub silentio*, to have its own language gutted by allowing parties to bypass the last sentence of § 621(a)(1) entirely and go directly to the FCC.³⁶

³⁵ *I-Star*, 885 F.Supp. at 1042.

³⁶ The *NPRM* appears to be trying to attempt to construe § 621(a)(1) in a manner analogous to the way some courts have broadly construed 47 U.S.C. § 253(a)’s “may prohibit or have the effect of prohibiting” language, *see City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), *cert denied*, 122 S.Ct. 809 (2002). But even assuming that § 253(a) can be fairly construed that broadly (and we do not think so), that is of no help to the FCC here, for

B. The *NPRM* Correctly Recognizes The Important Public Policy Goals Of Sections 621(a)(3), 621(a)(4)(A) And 621(a)(4)(B).

While we do not believe the Commission has jurisdiction over these matters, we wholeheartedly agree with the tentative conclusions reached in paragraph 20 of the *NPRM*. All three of the Cable Act provisions to which the *NPRM* refers – § 621(a)(3)’s requirement of assurance that access to cable service is not denied due to income, § 621(a)(4)(A)’s requirement that an operator be given “a reasonable period of time to become capable of providing cable services to all households in the franchise area,” and § 621(a)(4)(B)’s requirement of adequate PEG capacity facilities and financial support – do indeed serve “important public policy goals.”

We note, however, that the Cable Act assigns to LFAs, not the Commission, the responsibility of tailoring these requirements to the particular needs of each local community.

1. Franchise Buildout Requirements.

Of course, the § 621(a)(3) prohibition on red-lining and the § 621(a)(4)(A) requirement of a reasonable time to build out a cable system both relate to a matter of some contention between Verizon and AT&T, on the one hand, and some LFAs on the other. But those two provisions embody a conscious Cable Act policy of encouraging buildout of cable systems. And it is a policy that has served the nation well. It bears noting that cable modem service is the most widely available form of broadband available to Americans today, and local cable franchising had a hand in that: It was local franchise buildout requirements that required cable operators to build out their systems on a non-discriminatory basis throughout their franchise territories, a buildout that, when cable systems were subsequently upgraded to provide broadband, meant that cable’s broadband services would reach the same wide areas that the cable franchise buildout

§ 253(a) on its face uses markedly different, and less specific, language than § 621(a)(1). These differences compel a different, and much narrower, construction of § 621(a)(1).

requirements had encouraged. It is more than a little ironic that it was the local cable franchising process, with community-by-community buildout requirements negotiated between LFAs and cable operators, that deployed broadband faster and more widely than state PUC (or FCC) regulation of telephone carriers.

RBOC opponents of franchise buildout requirements have also mischaracterized the nature of those requirements. While they do (and should) vary from community to community based on such factors as geographic size, topography, household density, and neighborhood dispersion, franchise buildout requirements typically have two critical features that are designed to make buildout as widespread as possible while, at the same time, accommodating economic constraints faced by the cable operator.

First, local franchise buildout requirements typically have a household density limitation. That is, absent a financial contribution by those requesting service in aid of construction, the operator is not required to build out its system to areas that have a household density below a certain threshold level. The threshold level varies from community-to-community. Over time, it also has tended to become lower as potential revenues per subscriber have grown, making progressively lower density levels more financially feasible to build.

Second, local franchise requirements also invariably provide the operator with a time period to complete building out its system in the franchise area. The period is almost always a negotiated one between the LFA and the cable operator, and of course will vary depending on the size of the area to be served, as well as other characteristics. (The larger the area to be constructed, of course, the more time the franchise will allow for the operator to build out its system.)

When properly understood, franchise buildout requirements are not “barriers to entry” at all.³⁷ To the contrary, they should be a problem for the RBOCs only if the RBOCs’ business plans are to provide new service only to selected demographic neighborhoods of a community, leaving less lucrative neighborhoods in the community only with a lesser, second-class form of service, or no service at all.³⁸ But if that is indeed the business plan, then local franchise buildout requirements will be essential if the goals Congress set forth in §§ 621(a)(3) and 621(a)(4)(A) are to be protected.

2. Franchise PEG and I-Net Requirements.

Public, educational and governmental (“PEG”) access channel capacity, facilities and equipment requirements, along with institutional network (“I-Net”) requirements, are among the most vital elements of the local community cable-related needs and interests that the Cable Act was designed to preserve and protect. Because they are based on each community’s own unique local needs, PEG and I-Net requirements vary considerably from community to community. And that is precisely what Congress intended. *See pp. 12-13 supra.* PEG and I-Net facilities and equipment requirements come in many forms – sometimes they are in-kind, sometimes they are monetary, and sometimes they are a mix of both. Monetary PEG and I-Net obligations also vary; they can be in lump sum form, in periodic lump sum payment form, some sort of variable cost form (typically per-subscriber or a percentage of gross revenues), or some combination of both.

Because PEG and I-Net franchise obligations are reflective of local community needs, a competitive franchise applicant should also be required to serve those same needs, and in a

³⁷ *NPRM* at ¶ 23. That ILEC service areas do not coincide perfectly with LFA jurisdictional boundaries is a red herring. The number of places where that is true is not significant at all. And even where that occurs, there is no evidence that LFAs are in the habit of insisting that ILECs build out areas outside their local telephone service areas. The issue has been raised by industry to divert attention from the real issue. Should ILECs be required to offer cable service in the same areas they offer telephone service? We think the answer should be “yes.”

³⁸ As the *NPRM* notes, it appears that is the plan of AT&T. *See NPRM* at ¶ 6 & nn. 36-37.

manner comparable to the incumbent operator.³⁹ What constitutes “comparable” will vary because each community’s needs vary, and thus generalizations are difficult to make. These matters are therefore particularly unsuited to any “one-size-fits-all” solution. The FCC’s only role, if any, should be to make clear that *all* cable operators, whether incumbent or not, have an obligation to meet, on a fair and equitable basis, the PEG and I-Net needs of each LFA area they serve.

C. The FCC Has No Authority To Adopt Rules Or Best Practices Concerning Section 621(a)(1).

The *NPRM*’s suggestion (at ¶ 21) that the Commission might adopt rules or “best practices” guidelines under § 621(a)(1) is misguided, as a matter of both law and policy. Congress deliberately assigned the FCC a very limited role under Title VI, giving primacy instead to the role of LFAs.⁴⁰ Title VI certainly cannot plausibly be construed to grant the FCC authority to become a sort of national franchising authority or national LFA oversight board, either generally or, particularly, in the case of local franchising decisions under § 621(a)(1).⁴¹ Yet that is precisely, and improperly, what adoption of Commission rules or “best practices” with respect to § 621(a)(1) would be.

Setting a “maximum timeframe” within which an LFA must act on a competitive franchise application (*NPRM* at ¶ 21) is wrong-headed. As an initial matter, the *NPRM*’s reference (at n.80) to the 120-day deadline for LFAs to act on franchise transfer applications under § 617, 47 U.S.C. § 537, actually confirms that the FCC has no authority to set such a deadline in the case of § 621(a)(1). In stark contrast to what it did in § 621(a)(1), Congress set a

³⁹ See note 33 *supra*.

⁴⁰ See pp. 10-15 *supra*.

⁴¹ *Id.* We are aware, of course, that legislation has been introduced in Congress that would transform the FCC into a sort of national franchising authority for broadband video service providers. While we philosophically disagree with those legislative proposals, they prove our point: The drastic rewriting of the Communications Act required to do what the *NPRM* proposes is the job of Congress, not an unelected FCC.

specific statutory deadline in § 617 and then went on to grant the FCC authority to prescribe regulations implementing that deadline, 47 U.S.C. § 537.

In the case of § 621(a)(1), of course, Congress did neither, and instead prescribed, in both § 621(a)(1) and § 635(a), that relief for violations of § 621(a)(1) must be sought in the courts, not from the FCC. Yet if, as the *NPRM* suggests, the FCC can rewrite § 621(a)(1) to make it read like § 617, then the words of § 621(a)(1), and of § 617, would have no meaning at all.

Furthermore, even if the FCC could prescribe a deadline under § 621(a)(1) (which it cannot), it would be bad policy. If an applicant knows that its franchise will be “deemed granted” within a set number of days, it has little or no incentive to bargain in good faith with an LFA. On the contrary, it will have an increased incentive to stonewall.

Moreover, a deadline to act and a “deemed granted” effect of inaction also would provide franchise applicants with an affirmative incentive to delay applying for the required local franchise until the last minute. This is because in most cases, due to state and local law public notice and hearing requirements for LFA action, the applicant will know that it will be impossible for the LFA to act within the prescribed FCC deadlines. In these circumstances, it might be in the applicant’s interest to delay any local application until the last minute, knowing that the result is likely to be a “deemed granted” approval.

A prescribed deadline for action also would create perverse incentives for LFAs. Rather than encouraging LFAs to work with franchise applicants in reaching a mutually acceptable franchise agreement, a deadline and “deemed granted” proposal would encourage LFAs to act quickly and either deny a provider’s franchise application or unilaterally grant it on terms that the applicant is unwilling to accept. The reason is obvious: Facing a deadline and a headstrong applicant in franchise negotiations, the *only* way that an LFA could preserve *any* ability to

exercise its Cable Act-protected authority to ensure that a cable operator meets local community needs and interests would be either to deny the application or grant it in the LFA's unilaterally imposed terms.

Only by acting precipitously on the application in this way could the LFA avoid the "deemed granted" effect of failing to act before the deadline lapsed. While any such denial or unilateral grant would of course be subject to challenge by the applicant before a court under § 621(a)(1), such litigation would at least still hold out the possibility of preserving the LFA's ability to protect local cable-related community needs and interests.

It is therefore difficult to see how a mandatory deadline that would encourage greater confrontation and litigation between LFAs and franchise applicants could serve the Commission's goal of promoting competitive franchises. Rather, a mandatory deadline would likely bog LFAs and franchise applicants down in more litigation. The result would be the worst of all possible worlds: possible frustration of both § 621(a)(1)'s pro-competitive objectives and, at the same time, the Cable Act's touchstone that franchises be tailored to meet *local* cable-related need and interests.

D. That A Franchise Applicant May Already Be In The Rights-Of-Way Does Not Change The Cable Act Requirement That A Cable Operator Must Satisfy Local Cable-Related Needs And Interests.

The *NPRM* (at ¶ 22) questions how what it claims is the "primary justification for a cable franchise" – an LFA's "need to regulate and receive compensation for the use of public rights-of-way" – "applies" in the case of franchise applicants, such as ILECs, that are already authorized to use those rights-of-way ("ROW") to provide telephone service. This question reflects a disturbingly flawed and crabbed understanding of the public obligations embodied in local cable franchising that the Cable Act preserves.

To be sure, the fact that a competitive franchise applicant is also the local ILEC will have an effect on the local franchising process. In the case of a local ILEC applicant, for instance, inquiry into the applicant's financial, technical and legal qualifications can usually be dispensed with. Similarly, in those local jurisdictions where ROW management requirements are imposed through generally applicable ordinances, rather than through individual franchise agreements (which is not true in all communities), ROW management issues in a cable franchise agreement with the local ILECs may also be truncated.

But an applicant's status as a local ILEC would have little or no affect on other aspects of cable franchising. PEG and I-Net requirements, for example, would be unaffected. The same would be true of franchise fee requirements, customer service standards, buildout requirements and police power requirements. In the case of buildout requirements, an applicant's ILEC status may in fact mean that such requirements are more justified, and less of a supposed "barrier to entry" (*NPRM* at ¶ 23), than in the case of a competitive franchise applicant with no pre-existing facilities in the LFA's jurisdiction and with far less financial wherewithal than an ILEC. For a small applicant with no pre-existing facilities, a jurisdiction-wide buildout requirement may indeed make entry more difficult in some large jurisdictions. In the case of an ILEC, however, it is difficult to see what policy would be served by allowing the ILEC to do with cable service what it cannot do with telephone service: selectively and discriminatorily favor some of its existing customer base over others.

PEG, I-Net, franchise fee, buildout, and customer service requirements are, in an economic sense, a form of compensation for use of the ROW to provide cable service, as opposed to use of the ROW to provide other kinds of utility services (to which, of course, different social obligations may attach). And they are requirements that the Cable Act has

decreed are necessary if a cable system is to be truly responsive to *local* community needs and interests. This structure ensures that at least one form of local media is in fact locally-responsive in what has become an era of increasingly consolidated, “cookie-cutter” national media. That, we submit, is a very valuable public benefit that the Cable Act rightly, and as it turns out, presciently preserves.

CONCLUSION

For the foregoing reasons, the Commission should not adopt any rules or guidelines to implement or enforce § 621(a)(1).

Respectfully submitted,

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